No. 79-427

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BERKEY PHOTO, INC.,

Petitioner,

v.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KODAK'S BRIEF IN OPPOSITION

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KODAK'S BRIEF IN OPPOSITION

Petitioner Berkey Photo, Inc. ("Berkey") seeks review of the court of appeals' disposition of virtually every claim for damages in this multifaceted, prolonged and factually complex case. Berkey's petition repeatedly misrepresents the reasoning and holdings of the court of appeals, and in effect asks this Court not for certiorari on the law but for another appellate review of the evidence adduced at an 8-month trial.

Far from constituting a transgression of the Seventh Amendment (Pet. 3, 25) or creating "avulsive changes in § 2 jurisprudence" (Pet. 19), the court of appeals' dismissal of Berkey's camera monopolization claim—the only

claim it finally adjudicated in Kodak's favor—was based on a careful and comprehensive review of "the evidence and the possible inferences in the light most favorable to Berkey" (30a) and a faithful application of the legal principles consistently articulated by this Court since *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911).

All the other challenged rulings are interlocutory and require further proceedings in the district court. Since their decisional consequence is uncertain, they are not now ripe for review. Moreover, the court of appeals' only error in directing further proceedings on Berkey's huge film and paper "overcharge" claims was error in Berkey's favor, as discussed in our conditional cross-petition (No. 79-499).

The decision of the court of appeals was rendered after full consideration of lengthy briefs and several hours of oral argument canvassing a record of 18,000 transcript pages and 3,000 exhibits. Its analysis of Berkey's claims and the evidence is reasoned and thorough, and presents no occasion for certiorari.

Questions Presented

1. Was the court of appeals correct in holding that a plaintiff in a treble-damage action must show wrongful conduct to establish a violation of § 2 of the Sherman Act (18a-22a), and that a leading firm's introduction of new products without "predisclosure" does not itself constitute such wrongful conduct (32a-45a)?

2. Was the court of appeals correct in holding that a treble-damage plaintiff must prove a causal link between alleged violations of law and alleged injuries and damages (71a-75a)?

Statement

Eastman Kodak Company ("Kodak") has been for many years the leading firm in virtually all phases of the photographic industry. Berkey has been for many years a leading photofinishing firm, and as such has been both a competitor of Kodak in photofinishing and a customer for Kodak's films, photographic print papers, and photofinishing equipment and chemicals (4a-5a).

Berkey began to compete with Kodak as a camera manufacturer in 1969, when it started producing cameras in the 126 format (10a; E 1173). The 126 or "Instamatic" camera, which featured easy cartridge loading, had been introduced by Kodak in 1963 and by 1969 had virtually displaced the old box-roll "Brownie" type cameras in the marketplace (E 1184). In March 1972, after a decade of development work, Kodak introduced what became the most successful amateur photographic products in history, the 1″ thick 110 or "Pocket Instamatic" camera, a correspondingly small film cartridge and a new fine-grain color print film (see 26a, 29a).[1]

Kodak made relevant specifications of the 110 camera and its interfacing cartridge, including manufacturing tolerances, available to other camera manufacturers for a total

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[1] Due to lower labor costs, Far Eastern manufacturers have entirely preempted production of the labor-intensive 35mm camera and have become a major force in domestic sales of mass market cameras as well (A 602-03, A 1151-52, E 616). Through product innovation, manufacturing efficiency and quality control, Kodak has nonetheless maintained a strong position in mass market cameras (9a; A 1151-53), and despite increasing challenges for technological leadership by major Japanese rivals (A 587-88, A 1352, A 1359), Kodak has held its preeminent position in the development and production of highly sophisticated light-sensitive materials, *i.e.*, photographic films and papers (11a; A 610, A 651, A 2386, E 3166). Kodak makes a net contribution of about $1 billion annually to the United States balance of payments and provides tens of thousands of stable and well-paid jobs.

fee of $60,000 about two months before introducing the new system (34a-35a; A 1318-20, E 3299, E 3313-16) and offered them licenses under all its relevant United States patents for a nominal royalty (a maximum of $10,000 annually) (E 3216e). Kodak refused, however, to accede to Berkey's subsequent demand for substantially broader and much earlier advance disclosure of Kodak's future innovations, and, in consequence, Berkey filed this action in January 1973 (A 2233-34, E 1072-76).

Berkey's principal claim at trial was that Kodak's introduction of the 110 system without "predisclosure" violated § 2 and caused Berkey unlawful injury as a competitor in the camera and photofinishing markets and as a purchaser of film and photofinishing equipment (31a-32a, 102a, 120a, 128a).

Berkey also, however, asserted a multitude of other claims, under both § 2 and various other provisions of the antitrust laws. Among the more prominent were claims of monopolization based on the "quality" of Kodak's products (32a, 47a-49a, 113a, 115a), the "need" for Kodak's product innovations (*id.*), the content of Kodak's advertising (28a-29a, 128a) and the fact that Kodak identified its products as made by it (62a-63a, 135a). Berkey further charged that Kodak violated § 2 by continually impairing the product quality of the photofinishing industry (121a), which produces and delivers to consumers the final products (prints and slides) made from over 90% of Kodak's film, in order to "gain a competitive advantage" for Kodak's own photofinishing business.[2] Berkey also challenged joint de-

[2] Kodak's photofinishing services are priced at a premium, and its share of this market (color and black & white) declined from 19% in 1956 to 9% in 1976 (E 619, E 620). Photofinishing contributes less than 2% of Kodak's profits (E 1176, E 1177, C 215), and Kodak's self-interest obviously lies in maximizing the product quality of the whole photofinishing industry.

velopment projects between Kodak and manufacturers of flash devices as unlawful under § 1 (80a-87a).[3]

An allegation not focused on at trial, but heavily emphasized in the court of appeals and here, was that Kodak "consistently refused to make its film available" for new formats developed by other camera manufacturers (Pet. 9). Berkey did not allege that it had ever designed a camera in a new format, much less that it had been refused Kodak film for such a camera.[4] It also adduced so little proof regarding this subject that the district court, though including virtually every other of Berkey's allegations in its hundred-page charge (A 218-336), refused to include this one, saying that "if there is any basis for an argument left here, it seems to me to be minute" (A 2337-39). Berkey conceded in the court of appeals that it had not stated a claim for relief based on the supposed unavailability of Kodak film (43a).[5]

The Camera Award. Berkey's camera damage award, $15,250,000 before trebling, was based solely on Kodak's

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[3] Other of Berkey's claims and charges are listed in the opinion of the court of appeals (5a-6a n.1). The allegations of wrongful conduct urged by Berkey in support of its paper "overcharge" claim are discussed in detail in the first of the district court's two opinions (133a-138a).

[4] Berkey's own officers acknowledged that "we don't invent" (E 295) and that its commercial success was due to "fallout from Kodak" (A 1033).

[5] The court of appeals, far from concluding that an unjustified refusal to make film available would be "irrelevant" (Pet. 14-15), said that, if proven and shown to cause injury to a plaintiff, it might well provide a basis for recovery (42a-43a). The only specific evidence Berkey adduced on film availability related to the Minox "spy camera," which Berkey had distributed for a foreign manufacturer in earlier years (A 595-96). Berkey acknowledged that the Minox was too expensive to be a mass market camera, and it was not a part of the camera market defined by the jury (A 238, A 2336-37). Moreover, Berkey asserted no claim related to sales of the Minox (43a).

failure to "predisclose" the 110 system so that Berkey could "be at the starting line when the whistle blows" (A 124). Berkey's claim of injury was not related to any decline in its sales from the levels of prior years, but to its failure to achieve what it claimed was its "fair share" of the market as expanded by demand for the 110 camera (45a & n.29). This formulation of Berkey's damage claim was necessary because Berkey, like Kodak's other competitors, had its best years ever after the 110 introduction.[6] The district court sustained the award after "a frequently subtle, inevitably comprehensive appraisal of [Kodak's] actions" (114a) led it to conclude that "the jury could have found the 110 introduction a scheme contrived almost

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[6] Kodak's competitors were in the market with their own 110 cameras beginning in late 1972 (29a), and they also enjoyed their highest camera sales ever with their existing models that year. Berkey's 1972 sales, for example, were 50% higher than any previous year (C 392). Kodak's introduction of the new 110 system, as is often the case with major product developments, stimulated sales in the entire market, as shown by the following table:

*Domestic Camera Sales 1968-1977, in Millions**

Year	Total Sales	Kodak's Sales	Others' Sales**	Berkey's Sales
1968	7.3	5.2	2.1	.05
1969	7.3	5.3	2.0	.20
1970	5.8	3.8	2.0	.39
1971	6.2	4.3	1.9	.46
1972	8.2	5.6	2.5	.73
1973	9.7	7.2	2.5	.61
1974	8.3	5.6	2.7	.76
1975	8.2	5.2	3.0	.60
1976	8.3	4.3	3.9	.84
1977	8.3	3.0	5.3	.78

* Excluding instant, 35mm, professional and movie cameras.

** Including Berkey.

Sources: E 1306, E 1184, E 2493, C 392.

wholly to crush competitors, and scarcely or not at all to compete by serving consumers better" (113a).[7]

The court of appeals, "construe[ing] the evidence and the possible inferences in the light most favorable to Berkey" and taking into account "the interrelationships among . . . the individual markets" over many years (8a, 30a), describes Berkey's claims and arguments fully, often assuming proof in support of Berkey's position where none existed (25a-55a). Berkey consequently does not dispute any part of the court's factual presentation; instead it distorts the court's conclusions and then attacks those distortions.[8]

In ruling on the camera claim, the court of appeals held that wrongful conduct is an essential aspect of a treble damage claim under § 2, and that the introduction into the marketplace of new and additional products, far from being "restrictive" or "anticompetitive," expands choice and is the very essence of competition on the merits (18a-22a, 25a-55a).

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[7] The charge to the jury continually reiterated this supposed dichotomy between "benefiting consumers . . . through better products" and "injury to competitors" by offering consumers the opportunity to purchase "inferior" products (*e.g.*, A 251, A 255-64). The court of appeals did not, as Berkey asserts (Pet. 13), condone these and other aspects of the charge, but expressly rejected them (48a-49a).

[8] Though not attacking the factual statements of the court of appeals concerning Kodak's actions, Berkey paints a black picture of Kodak's "intent" (Pet. 11). The documents quoted by Berkey either say the opposite of what Berkey implies or state proposals that were not adopted. Thus, the entire point of E 1817 was that the Pocket Instamatic was *not* a "cute little camera"; the author of the "hammerlock" memo was suggesting that Kodacolor II *not* be emphasized in advertising the 110 system, a suggestion that was followed as the advertising focused on the "pocketable" camera (53a; see E 2497-2899); and the suggestion in E 1307 that film sales would be encouraged if the Pocket Instamatic were not priced at a premium, was rejected, and the Pocket Instamatic was priced substantially higher than Kodak's 126 cameras (E 1160, E 1161). Such misrepresentative recitations of "evidence" are the hallmark of Berkey's approach to the judicial process.

The court of appeals did not hold, nor did Kodak ever assert, that "deliberately exclusionary conduct . . . [should] be deemed *per se* lawful . . . because it was . . . associated with product introduction" (Pet. 3, 7, 26). The quotation attributed to Kodak (Pet. 6) is the rhetoric of the district court, and the court of appeals expressly rejected any such holding since wrongful conduct "associated with" new products is obviously no different from wrongful conduct "associated with" old products (46a). Similarly, contrary to Berkey's complaint that the court of appeals "created enclaves of immunity" for " 'leveraging' of monopoly power" (Pet. 3, 7, 14, 15, 27), the court expressly endorsed Berkey's "leveraging" theory (22a-25a); it simply disagreed that the production of a smaller, finer-grain film for use in a new smaller camera constituted unlawful "leveraging" (40a-41a, 51a-55a).

In like vein, Berkey's defensive characterizations of its "predisclosure" demand as "non-technical" (Pet. 14) and "not involving any information whatever about cameras" (*id.* at 3, 11-13, 30) are both revealing of the importance of "predisclosure" in the case and false.

Berkey said before trial that it was entitled to disclosure of all "relevant facts" at the same time such facts were communicated within Kodak, as well as "invitations to participate in committees to coordinate the development of products" (C 438). With respect to the 110 system, Berkey set forth 50 steps of required "predisclosure" by Kodak to camera manufacturers from August 1963 to February 1974, including such items as a requirement to disclose "tentative decisions on details of body, lens, film advance and ASA" in June 1967 (C 439-43). Berkey's counsel repeatedly adverted to "predisclosure" during trial (see A 265) and interrupted Kodak's trial counsel's summation to tell the jury that Berkey was entitled to 5 years ad-

vance notice of the 110 system (A 413), even though Berkey was not a camera manufacturer 5 years before introduction of the 110.

The Film and Color Print Paper Awards. Berkey's claim of monopolization of the amateur film market was based principally upon the 110 introduction in 1972, which the district court held unlawful in this context on the ground that it had "the express purpose and clear effect of buttressing Kodak film sales" (128a). The district court also condemned Kodak's restriction of its own photofinishing business to the processing of Kodak film (128a-129a). No proof was adduced that either of these "wrongful acts" had anything to do with Kodak's film prices, but Berkey was nonetheless awarded "overcharge" damages of $11,500,000, untrebled, on all sizes and types of Kodak film it purchased during the statutory period, 1969 through 1977.

Berkey's claim of unlawful conduct in the color print paper market, which the district court ultimately rejected (133a-138a), similarly bore no relationship to that "overcharge" award ($8,803,000, before trebling).

In its first post-trial opinion, the district court advanced the concept of an "overcharge" award as a penalty for monopoly power rather than as compensation for injury suffered by reason of a violation of the law, but suggested that it need not "go this far" (127a n.20). In its second opinion, however, when it confronted the absence of any causal link between Kodak's prices and Berkey's allegations, the district court finally held that no causal link, direct or indirect, was required for recovery (175a).

The district court never addressed the fact that Berkey freely chose to purchase Kodak film and paper despite the availability throughout the statutory period of competitors' lower-priced products, nor the fact that Berkey failed

to prove that anything other than quality and consumer preference accounted for Kodak's price premium.[9]

The court of appeals, noting that the two allegedly wrongful acts relied upon by the district court in the film market could not "have had a very large impact on Kodak's film prices" (75a), held that Berkey, like every other tort plaintiff, had to present evidence that its injury "flowed from" the alleged unlawful acts (71a-74a).[10] The court of appeals remanded both the film and paper claims, however, for retrial under the legal standards it set forth, including a determination of whether allegedly wrongful conduct antedating the statutory period caused damages continuing into the statutory period (74a-76a). (See our conditional cross-petition in No. 79-499.)[11]

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[9] Since there was no proof either of any foreclosure of the channels of distribution or of any capacity limitations that would have made Kodak in effect a supplier of last resort, the only conclusion possible is that consumers paid premium prices for Kodak products as a matter of freely exercised personal choice. This was conceded by Berkey's counsel, who stated with respect to other films, "You couldn't sell them. No one would buy them." (A 1785)

[10] In the court below, Berkey disparaged any standard requiring that it establish " 'causation-in-fact' " (Berkey Brief, March 16, 1979, at 120), and here it characterizes this requirement, fundamental to the whole of tort law, as "unprecedented" (Pet. 3). Berkey then asserts that the Court should reinstate the film and paper awards because Kodak's prices were the "result" of Kodak's "monopolization" (Pet. 7-8). Such a causal connection between acts of monopolization and prices is, of course, what Berkey failed to prove at the first trial and has been given a second chance to establish.

[11] Far from not "questioning the legal sufficiency of the jury verdicts" of film and paper monopolization (Pet. 7, 19), the court of appeals' rejection of Berkey's contention that the 110 introduction was unlawful in the camera market was applicable *a fortiori* to the film market. The court also rejected Berkey's claims of unlawful "systems selling" (46a) and unlawful introduction of "inferior" products (48a-49a), and said it had "no occasion to consider" Berkey's other claims of wrongful conduct (76a).

The Photofinishing and § 1 Awards. The two photofinishing damage awards ($55,700 and $19,000, before trebling) were based on Kodak's failure to "predisclose" the 110 system. Berkey claimed to have been unlawfully injured by Kodak's six-week "headstart" in 110 film processing (about 1/10 of 1% of the processing business done during that period) and by Kodak's sale of allegedly defective and overpriced 110 processors. The court of appeals, though finding the 110 introduction to be otherwise lawful, remanded the claims for a determination of whether Kodak had in some unlawful way thereby obtained any "competitive advantage" in the photofinishing market (22a-25a, 56a-63a).

Berkey's two claims under § 1 of the Sherman Act were for lost camera sales allegedly resulting from Kodak's joint development programs with flashlamp manufacturers, which led to the introduction in 1970 and 1975 of new flash devices and compatible cameras. These claims were unrelated to the 110 introduction and were sustained by both the district court and the court of appeals (76a-87a). The district court, however, overturned a damage award for the year 1971 as lacking "any rational relationship to any wrong for which Kodak may be held liable" (125a-126a). The court of appeals disagreed with the total rejection of the award, but said the district court could properly have found it "excessive" and remanded for redetermination of the amount of damages (87a-90a).

ARGUMENT

I.

Controlling precedent mandated the dismissal of Berkey's camera claim under § 2 of the Sherman Act.

A. Contrary to Berkey's position (Pet. 19-21), a cause of action for treble damages based on § 2 is not made out by showing possession of monopoly power—it requires as well proof of the "willful acquisition or maintenance" of that power to the demonstrable injury of the plaintiff by means of acts which are "unlawful and exclusionary," *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 576 (1966). Such "unlawful and exclusionary" acts are those which by predation, coercion, or restriction deny others "access to the market," *United States* v. *Griffith*, 334 U.S. 100, 108 (1948), and "exclude them from their right to trade," *Standard Oil Co.* v. *United States*, 221 U.S. 1, 76 (1911).

Kodak's introduction of a new and additional photographic system, in competition with cameras and films already on the market, was neither unlawful in nature nor "exclusionary" in effect. Rather it exemplified precisely the "superior product [or] business acumen," *United States* v. *Grinnell Corp.*, 384 U.S. at 571, and "the process of invention and innovation," *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954), that, throughout the history of the Sherman Act, have been regarded as the epitome of competition itself.[12] Far from restraining trade,

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[12] *See id.*; *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 390-91 n.15 (1956) (quoting legislative history of the Sherman Act); *Standard Oil Co.* v. *United States*, 221 U.S. at 75;

(footnote continued on following page)

the development and marketing of the 110 system actually and literally created commerce.[13]

The ambiguous and imprecise language of *Alcoa* [14] cannot be read to prohibit "monopoly in the concrete," *Standard Oil Co.* v. *United States,* 221 U.S. at 62, and it has not been so read by this Court. *See American Tobacco Co.* v. *United States,* 328 U.S. 781, 786 (1946) (describing *Alcoa* as involving the "use of various unlawful means," to be contrasted with "a new discovery or an original entry into a new field"); *United States* v. *Grinnell Corp., supra.* In rejecting Berkey's contrary argument, the court of appeals did no more nor less than construe and apply *Alcoa* in accordance with the overwhelming force of authority (18a-24a).

Berkey's claim of unlawful injury from competitive innovation is noteworthy only in its rejection, indeed inversion, of basic legal principles. If wrongful conduct is not required for the recovery of damages, then the concepts of causation and injury must also be discarded. The end of such a path is not law as we know it, but arbitrary transfers of wealth according to the subjective value judgments of judges and juries. *Cf. TVA* v. *Hill,* 437 U.S. 153, 195 (1978).

(footnote continued from preceding page)

Telex Corp. v. *IBM,* 510 F.2d 894, 925-28 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975). *See also* U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 60 (1955) (monopolies do not monopolize "by being active, enterprising and dynamic," conduct meant to be encouraged by the antitrust laws); III P. AREEDA & D. TURNER, ANTITRUST LAW 77-78 (1978).

[13] Berkey acknowledged in its complaint that the 126 introduction a decade earlier caused a market to "come into being" (A 8).

[14] *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

Moreover, Kodak's camera competitors were not "excluded" by the 110 system, even in Berkey's peculiar usage of that word to mean not sharing in someone else's success. Rather, the industry as a whole thrived upon introduction of the 110, which Berkey's top management described as "a tremendous advance in photography" (E 226) that is "giving us . . . a great boost" (E 252).

B. As noted above (page 8), the court of appeals created no "enclaves of immunity from § 2 scrutiny for willfully exclusionary conduct" (Pet. 3). Instead, it distinguished between the natural, proper and socially useful benefits of industrial integration and the misuse of monopoly power in related markets, termed "leveraging" by Berkey (22a-25a).[15] Nor did the court create a rule of "per se" legality for "conduct associated with product introduction" (Pet. 3, 26). Berkey's real, though disclaimed, complaint is that the court did not adopt a *per se* rule of illegality for a dominant firm's product innovation without "predisclosure" (see 37a-38a).

Berkey's novel demand for "predisclosure" is repugnant both to the concept of private property basic to our law and society, and to the express policy embodied in the federal patent and state trade secret laws, *see Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 484 (1974). As a matter of antitrust policy, "predisclosure" would have ob-

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[15] Berkey's "leveraging" premise—that consumers purchased the Pocket Instamatic camera (retailing for $30-$130) so that they would be able to use the allegedly defective Kodacolor II film—was both inherently incredible as a theory of human behavior and entirely devoid of evidentiary support. The court of appeals did not, as Berkey asserts here (Pet. 15), require untold numbers of consumers to testify; it only noted in closing that Berkey had failed to produce "anyone" to support the claim, when the evidence—if it existed—should have been readily available from Berkey's own retail store employees (54a-55a; A 2591-92). Nor did Berkey challenge testimony to the contrary (A 1370).

vious and significant anticompetitive, not pro-competitive, effects. *See United States* v. *National Lead Co.*, 332 U.S. 319, 359 (1947). The court of appeals' rejection of "pre-disclosure" accords with the only other case to have considered such a notion, albeit in a form far less drastic than that advanced by Berkey. *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F. Supp. 423, 437 (N.D. Cal. 1978), *appeal docketed*, No. 78-3050 (9th Cir. Sept. 12, 1978).[16]

C. The court of appeals' rejection of Berkey's contentions creates no conflict with any of the decisions of this Court or other circuits cited by Berkey (Pet. 19-22), all of which involved monopolistic acquisitions or conspiracies, predatory or coercive conduct, or restrictive agreements foreclosing commerce. Nor does the opinion below have any astounding consequence for various complex and diverse government and private actions now pending in the lower courts (Pet. 22-23, n.36). Presumably the courts hearing those cases will apply the decisions of this Court to the facts before them as faithfully as the court of appeals did here.

Berkey erected a byzantine structure of inconsistent and improbable factual allegations and sought mightily to avoid traditional legal principles in order to arrive at the claim it now asks the Court to review in myriad detail and reinstate. The holding below was clearly correct, both under controlling precedent and as a rejection of massive "antitrust" litigation as a new form of corporate diversification.

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[16] Memorex, the plaintiff in *ILC*, sought only disclosure of interface specifications for new IBM computers at the time of announcement and for a fee. 458 F. Supp. at 437. Such disclosure was provided by Kodak two months before the 110 introduction (see pages 3-4, above).

II.

The film and paper "overcharge" claims are not ripe for review, and the court of appeals' ruling on causation conforms with statutory and decisional law.

The court of appeals remanded the film and paper "overcharge" claims to afford Berkey an opportunity to prove that its alleged injuries "flow from" wrongful conduct (71a-74a). In so doing, the court did not "add requirements beyond what is specifically set forth by Congress" (Pet. 33), but merely complied with the express language of § 4 of the Clayton Act, which allows recovery only for injuries actually sustained "by reason of" unlawful conduct. 15 U.S.C. § 15.

The requirement of a causal link between violation of law and injury is as basic in antitrust treble-damage actions as in common-law tort actions, and has been repeatedly reaffirmed by this Court. *E.g., Reiter* v. *Sonotone Corp.*, 99 S.Ct. 2326, 2332 (1979) (recovery may be had for prices "inflated by reason of . . . anticompetitive conduct"); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977) (injury must be attributable to "that which makes [the act] unlawful"); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (injury must be "the certain result of the wrong"). As the court of appeals noted (72a n.56), this Court applied that requirement with full force to the claim for monopoly "overcharges" in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), upon which Berkey inexplicably places great reliance (Pet. 32).[17]

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[17] This Court's rejection of the "pass-on" defense in *Hanover Shoe* provides no support at all for dispensing with proof of causation of injury and damages. Hanover Shoe, unlike Berkey, had proved causation of injury in fact; absent such proof, liability would not have been established, and the "pass-on" defense would never have been considered.

The standard on remand allows Berkey to prove not only direct causation, *i.e.*, that prices it paid were raised by a wrongful act, *see* III P. AREEDA & D. TURNER, ANTITRUST LAW 73, 98-99 (1978), but also indirect causation—that price increases resulted from "distortion of the market" caused in turn by wrongful conduct (73a). Berkey failed to prove anything approaching direct causation at the first trial, and its present complaint that it cannot prove indirect causation either (Pet. 34-35) is reason not for awarding it tens of millions of dollars in "damages" from Kodak, but for dismissing its claims.

Moreover, a remand of the film claim was required aside from the failure to prove causation because it was put to the jury with clearly erroneous instructions on the relevance of "systems introduction" and product quality (*e.g.*, A 249-64) and was sustained by the district court principally on the erroneous thesis that the 110 introduction was unlawful (126a-129a).[18] As to the paper claim, Berkey can hardly complain of being given a second chance to prove its case, which also went to the jury under erroneous instructions regarding conduct and which the district court found insufficient as to both liability and damages (133a-138a).

III.

The court of appeals' remand of the photofinishing claims and one § 1 damage award presents no question for this Court.

Berkey asserts in its petition that the photofinishing services and equipment awards should have been sustained because the court of appeals "referred to no error which

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[18] The charge went so far as to permit a finding of film monopolization based solely on conduct affecting another market; the district court expressly recognized that if this nonsensical proposition, "which I have been bullied into accepting for our purposes, is held erroneous," Berkey "is wiped out on appeal" (A 1713).

affected the award" (Pet. 4). Aside from the fact that this Court does not grant certiorari "to review evidence and discuss specific facts," *United States* v. *Johnston,* 268 U.S. 220, 227 (1925), we note that Berkey's photofinishing claims were based on the 110 introduction, which the court of appeals "referred to" at some length (see 25a-63a).

Berkey also asks the Court to review the court of appeals' determination to remand rather than reinstate a § 1 damage award pertaining to the year 1971, an award that had been overturned by the trial court as based on nothing "more than speculation" (125a) and that the court of appeals suggested was probably "excessive" (89a-90a). Seeking certiorari on this issue, wholly a question of fact, is frivolous. *United States* v. *Johnston, supra.*

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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